(i)

Supreme Court, U.S.
FILED

02 294 AUG 22 2002

OFFICE OF THE CLERK

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

JUAN MOISES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS F. LIOTTI, ESQ. (TFL4471)
Admitted to the Supreme Court of the
United States January 19, 1988
Counsel for Petitioner
600 Old Country Road, Suite 530
Garden City, New York 11530
(516) 794-4700

53pp

QUESTIONS PRESENTED

1. **Was Petitioner Improperly Convicted and Did he Improperly Receive a Twenty Year Term of Imprisonment Where the Trial Court Incorrectly Charged Jurors to Ignore Entirely the Issues of Quantity and Purity of Drugs and Allowed Jurors to Decide Guilt on the Basis of Unqualified Hearsay Testimony from "Cooperators" Alone?**

   Answer: Yes.

2. **Was Petitioner Deprived of his Constitutional Rights of Trial by Jury; Due Process of Law and the Right of Confrontation in that the Trial Court Improperly Allowed into Evidence the Plea Agreement and Allocution of Carlos DeLuna, an Admitted Drug Dealer and Member of a Drug Conspiracy?**

   Answer: Yes.

Table of Contents

Questions Presented i

Table of Contents ii

Table of Authorities

Table of Cases iv

Other Statutes and Authorities vii

Opinion Below 1

Jurisdiction 2

Constitutional Provision and Statutes Involved 2

Preliminary Statement 2

The Charges 3

Statement of the Case 3

Sentencing 6

Point I

The Petitioner Was Improperly Convicted And Received A Twenty Year Term of Imprisonment Where the Trial Court Incorrectly Charged Jurors To Ignore Entirely The Issues Of Quantity And

Purity Of Drugs And Allowed Jurors To Decide Guilt On The Basis Of Unqualified Hearsay Testimony From "Cooperators" Alone 9

Point II

The Petitioner Was Deprived Of His Constitutional Rights Of Trial By Jury; Due Process Of Law And The Right Of Confrontation In That The Trial Court Improperly Allowed Into Evidence The Plea Agreement And Allocution Of Carlos DeLuna, An Admitted Drug Dealer And Member Of A Drug Conspiracy 23

The Court of Appeals 27

Conclusion 28

Appendix A1 - A13

TABLE OF AUTHORITIES

TABLE OF CASES

Apprendi v. New Jersey, 120 S.Ct. 2348, 2000 WL 8907189.....6,11,13, 14, 15, 22, 27

Bourjaily v. United States, 483 U.S. 171 (1987).....20, 22

Ithaca College v. NLRB, 623 F.2d 224, 228 (2d Cir. 1980).....14

Jones v. United States, 119 S.Ct. 1215 (1999).....12

Krulewitch v. United States, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949).....18

United States v. Aguayo-Delgao, 2000 WL 988128.....11

United States v. Beckham, 968 R.2d 47, 51 (D.C. Cir. 1992).....21

United States v. Byrom, 910 F.2d 725, 736 (11th Cir. 1990).....21

United States v. Clark, 18 F.3d 1337, 1341-42 (6th Cir.), cert. den'd, 115 S.Ct. 152 (1994).....21

United States v. Cruz, 797 F.2d 90 (2d Cir.1986).....10

United States v. Daly, 842 F.2d 1380, 1386 (2d Cir.), cert. denied, 488 U.S. 821 (1988).....21

United States v. Gordon, 844 F.2d 1397, 1402 (9th Cir. 1988).....21

United States v. Granderson, 511 U.S. 39, 54 (1994).....13

United States v. Heater, 63 F.3d 311 (4th Cir. 1995).....10

United States v. Hernandez, 829 F.2d 988, 993 (10th Cir. 1987), cert. denied, 485 U.S. 1013 (1988).....21

United States v. Hernan Moreno and Oscar Fabian Moreno, 2000 WL 1843232 (SDNY).....13

United States v. Meshoc, 2000 WL 1218437.....11

United States v. Moises, 2002 WL 563469.....1, 3

United States v. Nunez, 180 F.2d 227 (5th Cir. 1999).....12

United States v. Rahme, 813 F.2d 31 (2d Cir. 1987).....10

United States v. Rinaldi, 393 F.2d 97, 99 (2d Cir.), cert. denied 393 U.S. 913 (1968).....19

United States v. Rios-Quintero, 204 F.3d 214 (5th Cir. 2000).....13

United States v. Sepulveda, 15 F.3d 1161, 1181-82 (1st Cir. 1993), cert. denied, 114 S.Ct. 2714 (1994).....21

United States v. Silverman, 861 F.2d 571, 577 (9th Cir. 1988).....21

United States v. Sheppard, 2000 WL 988127.....11

United States v. Spencer, 415 F.2d 1301, 1304 (7th Cir. 1969).....19

United States v. Zambrana, 841 F.2d 1320, 1344-45 (7th Cir. 1988).....21

Wong Sun v. United States, 371 U.S. 471, 490, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).....19

OTHER STATUTES AND AUTHORITIES

18 *U.S.C.* §2119.....12

21 *U.S.C.* §812.....2

21 *U.S.C.* §841.....12

21 *U.S.C.* §841(a)(1).....2, 3

21 *U.S.C.* §841(b)(1)(c).....6

21 *U.S.C.* §841(b)(1)(A).....3

21 *U.S.C.* §841(b)(1)(A)(ii)(II).....2

21 *U.S.C.* §841(b)(1)(A),(B),(C) & (D).....12

21 *U.S.C.* §841(b)(ii).....16

21 *U.S.C.* §844.....16

28 *U.S.C.* 1254(1).....2

U.S.S.G. § 3C1.1.....24

U.S.S.G. § 3E1.1.....24

U.S.S.G. § 3E1.1(a) and (b)(2).....23

California Evidence Code §1223.....19

Comment, 25 U.Chi.L.Rev. 530 (1958).....18

Federal Rules of Evidence Rule 801(d)(1).....20

Federal Rules of Evidence Rule 801(d)(2).....20, 22

Federal Rules of Evidence Rule 801(d)(2)(E).....17, 19

Federal Rules of Evidence Rule 105.....10

Levie, Hearsay and Conspiracy, 52 Mich.L.Rev. 1159 (1954).....18

New Jersey Rule 63(9)(b).....19

New York Evidence Handbook, Martin, Capra & Rossi, Aspen Law & Business, 1997.....9

Senate Report No. 93-1277.....19

An Apprendi Primer: On The Virtues Of A 'Doubting Thomas', Jon M. Sands & Steven G. Kalar, The Champion, Vol. XXIV, No. 8, October, 2000 @ 18.....11

Apprendi: Getting The Work Out, Timothy Crooks, The Champion, Vol. XXIV, No. 10, December, 2000 @ 26.....11

IN THE
SUPREME COURT OF THE UNITED STATES

JUAN MOISES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Mandate on May 31, 2002 from the United States Court of Appeals for the Second Circuit

Petition for Writ of Certiorari

Opinion Below

The opinion of the Court of Appeals below (Appendix p. A1-A4) is a Summary Order and is not reported.

The opinion of the District Court (Appendix p. A7-A13) was reported at *United States v. Moises,* 2002 WL 563469.

Jurisdiction

The mandate of the Court below (Appendix p. A5-A6) was issued on May 31, 2002. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 *U.S.C.* § 1254(1).

Constitutional Provision and Statutes Involved

The Fifth Amendment, United States Constitution, which provides in relevant part that "... no person shall be deprived of life, liberty or property without due process of law..." and

The Sixth Amendment, United States Constitution, which provides in relevant part, that "the accused shall enjoy the right...to be confronted with the witnesses against him...".

The statutes under which Petitioner was prosecuted were 21 *U.S.C.* 846, governing conspiracies to commit an offense under Chapter 13 entitled Drug Abuse Prevention and Control. The Petitioner was also convicted of violating 21 *U.S.C.* 841(a)(1) and (b)(1)(A)(ii)(II), which provides that it shall be unlawful for a person to knowingly or intentionally distribute five or more kilograms of cocaine.

Preliminary Statement

The defendant was arrested on August 30, 1999. A jury trial occurred from May 22, 2000 to June 9, 2000. There were no pre-trial hearings. The Court charged the jury on June 8, 2000 and it returned a verdict on June 9, 2000.

The Charges

The indictment of Juan Moises (99 Cr. 711) charged that from in or about 1997 up to and including in or about September, 1998, he conspired to violate the federal narcotics laws, to wit: 21 *U.S.C.* §§ 812; 841 (a)(1) and 841 (b)(1)(A). The overt acts were surprisingly innocuous, alleging that the following overt acts were committed "in the Southern District of New York: (a) on or about March 19, 1998 a coconspirator not named as a defendant herein drove a blue minivan in which was a black bag containing approximately $885,000 in narcotics proceeds from a store parking lot in the Bronx, New York to 1765 Westchester Avenue, Bronx, New York (b) on or about July 25, 1998, Juan Moises, a/k/a, "Johnny Alpha" the defendant, rented a room at the Westgate Hotel in San Diego, California. (21 *U.S.C.* § 846).

The Government's superceding indictment changed the dates of the alleged conspiracy to "in or about 1990 up to and including in or about September, 1998" and added Carlos DeLuna, a/k/a, Primo as a coconspirator. It also added one overt act (c) where Moises and DeLuna allegedly met in the Bronx, New York with unnamed coconspirators to "discuss the delivery of hundreds of kilograms of cocaine to the coconspirators."

Statement of the Case

On June 9, 2000, in a cause then pending in the United States District Court for the Southern District of New York, entitled *U.S.A. v. Juan Moises*, Docket No. SI CR 711-01 (WHP), Petitioner was found guilty by a jury on an indictment of conspiring to distribute five or more kilograms of cocaine over a ten year period..

On June 1, 2001, the Petitioner was sentenced by the Honorable William H. Pauley, III of the United States District Court for the Southern District of New York to 240 months of imprisonment, five years of supervise released and a special assessment of $100.00. This judgment and sentence was affirmed by the Court of Appeals for the Second Circuit, No. 01-1319, on or about May 10, 2002.

Carlos Manuel Suero testified for the Government. Mr. Suero indicated that he operated a business known as Uno Communications Center in 1998. Uno Communication Center was located at 714 West 181st Street in New York City. Mr. Suero indicated that he first met Juan Moises in approximately 1985. According to Mr. Suero the petitioner was then engaged in a security business, and Mr. Suero worked for Mr. Moises at his firm known as Alpha Security and Communications in approximately 1990. Mr. Suero indicated that Mr. Moises had been in a business with Suero's relative, Rafael Pena. After leaving Alpha Security Systems or Alpha Communications, Suero worked at Bravo Communications which was owned by Rafael Pena. Mr. Suero worked for Bravo for five years and in 1997 started his own business known as Uno Communications. He says he sold pagers to the defendant. Suero testified that Mr. Moises came into Uno Communications with his son, and with a cousin referred to as Primo DeLuna. No marked money, tapes or other evidence were recovered from Mr. Moises. In over 1000 conversations overheard by the Government and taped, not one pertained to Juan Moises and his alleged involvement with drugs.

Rafael Antonio Duverge Gomez a/k/a Fello was the next witness for the Government.

Special Agent Erin McKenzie of the Drug Enforcement Administration arrested Carlos DeLuna and recovered 89 kilograms

from the trunk of his car. He also recovered some pagers. It was during McKenzie's testimony that certain drugs that had been seized, albeit not from the defendant, were tested and a stipulation concerning the results of those tests was received in evidence. (Tr. 1178) Trial counsel erred in doing so, but like the others who testified against Mr. Moises, not one had any hard evidence, not a photo and no corroboration, except snitches who made deals with the Government to free themselves. Carlos DeLuna negotiated the best deal of all since he never had to testify. The minutes of Mr. DeLuna's plea allocution were read into the record over the vigorous objection of the defense. (Tr. 1184) The Court gave the jurors a cautionary instruction in relevant part, as follows:

> "If you find, based in part on these statements, that the conspiracy charge in the indictment existed, you must decide as a separate question whether the defendant Juan Moises a/k/a Johnny Alpha, was part of the alleged conspiracy, based entirely on the other evidence in the case." (Tr. 1186)

The Government rested without DeLuna testifying.

The first and only witness for the defense was the petitioner himself, Juan Moises. The petitioner testified as to his acquaintanceship with certain people named in the case, such as Luis Guzman, whom he said is related to his ex-wife, Maria Moises, through marriage (Tr. 1214) and Rafael Paz who was his brother-in-law. (Tr. 1214) Carlos DeLuna was described as a blood cousin. Similarly, Moises described his relationship with other individuals who had been named. Moises described his legitimate business endeavors and did not admit to any wrongdoing whatsoever.

Sentencing

The sentencing of Juan Moises occurred on June 1, 2001. The Court had made a decision on May 24, 2001 pursuant to *Apprendi v. New Jersey,* 120 S.Ct. 2348, 2000 WL 8907189. Judge Pauley determined that *Apprendi* applied to the *Moises* case; that he had instructed the jurors to disregard any determination on quantity of drugs. Thus, the jury did not make a finding on quantity of drugs. At sentencing the defense argued that while the Court made a correct decision under *Apprendi*, this was not a case where it could easily determine quantity since all the testimony on that point was in the nature of hearsay. Any testimony that was received against him relative to quantity of drugs came exclusively from cooperators. Mr. Moises testified in his own behalf. The Judge chose to credit the testimony of cooperating witnesses rather than a petitioner who elected not to make any deals with the United States Government and testified in his own behalf. The Court noted:

> "As the court stated in its May 24, 2001 memorandum and order, although the quantity of drugs was not found by the jury, the court retains the discretion to take into account the quantity of drugs in determining a sentence at or below the statutory maximum sentence. If the determination with respect to quantity leads to a suggested sentence range under the sentencing guidelines that is greater than the 20 year statutory maximum authorized by 21 *U.S.C.*. § 841(b)(1)(c), this court may not

> sentence the defendant to more than 20 years.
>
> "This court finds that the amount of cocaine involved in the defendant's offense is approximately 2,000 kilograms, based on the testimony of the co-conspirators Edward Vidal and Rafael Duverge at trial. See, for example, the trial testimony, at pages 777 to 780, as well as Carlos DeLuna's plea allocution. The corresponding offense level under the sentencing guidelines is, therefore, Level 38." (Tr.S. 44)

The Court then increased the petitioner's offense level by two levels because he testified and denied being a drug dealer, contrary to the testimony of the cooperating witnesses. Other than conclusory statements and generalities, the Court failed to make specific findings as to where it was claimed that the petitioner lied. (Tr.S. 47)

The Court also found that the petitioner acted as a manager or supervisor, giving the petitioner a three level enhancement and bringing his total offense level to 43. Again, the Court made no factual findings except those founded upon hearsay alone. (Tr.S. 48) The Court concluded that the petitioner was in criminal history category 1. (Tr.S. 48) While commenting that the guidelines call for life incarceration at level 43 in category 1, the maximum statutory range is zero to 20 years. The Court declined to downwardly depart based upon family circumstances. (Tr.S. 48) The Court then imposed a sentence of 240 months, to be followed by a term of supervised release of five years that it said it required of all defendants, even

though Mr. Moises had not been shown to be a user of drugs, that he submit to drug testing. (Tr.S. 49) The Court declined to impose a fine saying that it would be an exercise in futility. It did impose a mandatory special assessment of $100. The petitioner filed a Notice of Appeal on June 6, 2001.

POINT I

The Petitioner Was Improperly Convicted And Received A Twenty Year Term of Imprisonment Where The Trial Court Incorrectly Charged Jurors To Entirely Ignore The Issues Of Quantity And Purity Of Drugs And Allowed Jurors To Decide Guilt On The Basis Of Unqualified Hearsay Testimony From "Cooperators" Alone

The petitioner was convicted on the basis of hearsay and the testimony of three cooperating witnesses alone. The Court did not make any findings during the trial as to whether the testimony was corroborated or met any standard of proof.

The exception to the hearsay rule concerns conspiratorial liability. While each conspirator is considered an agent of the other, the law views a conspiracy as a partnership in crime. Thus, the acts of one conspirator are treated as the acts of all members of the conspiracy, so long as the acts are within the course of the conspiracy and intended to further conspiratorial goals. The co-conspirator exception to the hearsay rule treats conspirators' statements in the same way - the statement of one conspirator is attributable to all the others, so long as it was made while the conspiracy was ongoing and it was intended to further conspiratorial goals. See Martin, Capra & Rossi, *New York Evidence Handbook*, Aspen Law & Business, 1997. See also, *Advisory Committee Comment to the Federal Rules of Evidence*, 801(d)(2)(E). Section 801(d)(2)(E), provides: "that a statement is not hearsay and may be offered against a party when it is a statement by a co-conspirator of a party during the course and furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment

relationship and scope thereof under subdivision (D) or the existence of the conspiracy and participation therein of the declarant and the party against whom the statement is offered under subdivision (E)."

The petitioner respectfully alleges that the Court's cautionary instructions throughout the trial did not include an appropriate advisement to the jury which should have included a clear instruction that the statements were being offered as an exception to the hearsay rule to prove the existence of a conspiracy in which the Government claims the petitioner was a participant. It is for the jurors to weigh the quality of this evidence and determine whether the Government has met its burden of proof of beyond a reasonable doubt. (Tr. 1186) Hence, in the absence of such an instruction, the jurors gave far more weight to the hearsay testimony of three cooperating witnesses than they should have. See also, *United States v. Heater*, 63 F.3d 311 (4th Cir. 1995), *United States v. Rahme*, 813 F.2d 31 (2d Cir. 1987) and *United States v. Cruz*, 797 F.2d 90 (2d Cir. 1986) cert. den'd. 107 S.Ct. 1631 (1987). The trial defense did not make a request to marshal the evidence or to separate hearsay from non-hearsay evidence. Hence, the jury gave equal weight to both hearsay and non-hearsay evidence. No real distinction was made between the two forms of evidence.

The Federal Rules of Evidence, Rule 105 provides:

> "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to it's proper scope and instruct the jury accordingly."

The Court here has permitted testimony from co-conspirators and third party hearsay involving conversations or statements allegedly made by the petitioner, both inside and outside of the United States. In many cases the witnesses did not overhear the conversations, about which they testified, or participate in them. Such testimony stretches the permissible limits of an exception to the hearsay rule to an extreme not countenanced by the rule.

Apprendi v. New Jersey[1], 120 S.Ct. 2348, 2000 WL 8907189, provided that any fact which raises the maximum penalty is an element of the offense which must be alleged in the indictment, and the jury so charged. All that is alleged in this case is five or more kilograms which would carry with it a minimum sentence of ten years if convicted. The Court may not arrogate to itself a jury function and determine an element of a criminal offense and hence, enhance the petitioner's sentence beyond what was pled and proven. The quantity of drugs attributed to the petitioner was not established by the use of an exception to the hearsay rule or by any other competent testimony. Circuit Courts following *Apprendi* have attempted to deal with this issue and have uniformly held that drug quantity is an element of the offense which must be proven by proof beyond a reasonable doubt. See *United States v. Aguayo-Delgao*, 2000 WL 988128; *United States v. Sheppard*, 2000 WL 988127 and *United States v. Meshoc*, 2000

---

[1] See, Jon M. Sands and Steven G. Kalar, *An Apprendi Primer: On The Virtues Of A 'Doubting Thomas'*, The Champion*, Vol. XXIV, No. 8, October, 2000 @ 18 and Timothy Crooks, *Apprendi: Getting The Work Out*, The Champion*, Vol. XXIV, No. 10, December, 2000 @ 26.

*The Champion is a publication of the National Association of Criminal Defense Lawyers and is mailed to all Federal Judges throughout the United States.

WL 1218437.

Ambiguities which arise when statutes are being interpreted are resolved by the rule of lenity which requires that the ambiguity be resolved in a manner most favorable to the petitioner. See *United States v. Granderson*, 511 U.S. 39, 54 (1994). Asking a jury to decide drug quantity within the broad ranges included in § 841(b)(1)(A) (B) (C) and (D) would not complicate a trial or risk unfairness. In this case the testimony of co-conspirators together with a generic verdict sheet not encompassing specific quantity, suggested that the rule of lenity should be applied. Quantity must be decided as an element of the offense and proven beyond a reasonable doubt. It is not a sentencing factor. Drug quantities under 21 *U.S.C.* § 841 are an element of the offense and to provide otherwise would violate both the Fifth and Sixth Amendments. In *Jones v. United States*, 119 S.Ct. 1215 (1999), the Court held that the provisions in 18 *U.S.C.* § 2119, the car jacking statute, which incrementally increases the punishment if serious bodily injury or death occurred as a result of a car jacking, must be treated as elements of the offense which had to be included in the indictment and charged to the jury. See also, *United States v. Nunez*, 180 F.3d 227 (5th Cir. 1999). In this case while the jury failed to reach any determination on quantity and was specifically told to disregard all such determinations, the Court at sentencing made a finding on quantity without findings of fact as to what hearsay testimony it credited in that regard.

The testimony in this case from cooperating witnesses suggested that there were alleged multiple organizations, independent contractors and multiple conspiracies interacting at various times in various events that were not necessarily a part of any single enterprise or overriding conspiracy. A question in this case arises as to what conspiracy the petitioner is convicted of participating in and what specific agreement or agreements applied to that conspiracy, who

made them and what overt acts were performed in furtherance of that particular conspiracy. None of these questions can be resolved from the testimony adduced at trial or the jury's verdict in this case. See *United States v. Rios-Quintero*, 204 F.3d 214 (5th Cir. 2000). Again, the Court did not qualify any of the testimony or limit it.

In *United States v. Hernan Moreno and Oscar Fabian Moreno*, 2000 WL 1843232 (SDNY), Judge Sotomayor, now of the U.S. Court of Appeals for the Second Circuit, was sitting by designation when she made her ruling in *United States v. Moreno*. Judge Sotomayor found that the recent Supreme Court ruling in *Apprendi* requires that any sentence above the most lenient maximum can be imposed only if the jury finds, beyond a reasonable doubt, that a certain amount of narcotics was involved in the offense.

Judge Sotomayor held:

> "This Court finds the principles set forth in *Apprendi* applicable to defendants' sentencings. There is no principled way to distinguish this Court's calculation of the drug quantities involved in the drug conspiracy in this case from the trial court's determination of the racial motivation for defendant's firearm possession crime in *Apprendi*. Both findings were made by judges, not juries; were proven by a preponderance of the evidence, not beyond a reasonable doubt; and had the effect of increasing the maximum sentence permitted under each statute.

> Because *Apprendi* is intervening controlling law, this Court is not bound by the Second Circuit's holding in *Thomas*. See *Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980) (stating, that district courts and other inferior courts are bound by decision of the Court of Appeals in the appropriate circuit unless overruled by an intervening Supreme Court decision or other changes in law). Accordingly, this Court joins the circuit courts who have addressed this issue and holds that *Apprendi* makes clear that drug quantity is an element and not a sentencing factor under § 841."

This case was tried some four weeks prior to the decision in *Apprendi*. The Court's charge was unavailing and unwittingly exacerbated the problem addressed in *Apprendi*. The Court's charge to the jury, in pertinent part, read as follows:

> "In this case the defendant is charged with conspiring to distribute and to possess with intent to distribute a controlled substance. In order to find the defendant guilty of the conspiracy charged in count I, you need find that an objective of the conspiracy was to distribute or to possess with intent to distribute more than 5 kilograms of cocaine.

> Finally, the purity and actual quantity of the cocaine involved is immaterial. You need only find that the co-conspirators agreed either to distribute or to possess with intent to distribute some quantity of cocaine." See Tr. 1582 & 1583

As the Court noted in *Apprendi*:

> "If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not–at the moment the State is put to proof of those circumstances–be deprived of protections that have, until that point, unquestionably attached." See 120 S.Ct. @ 2359

Justice Stevens noted in the majority decision of *Apprendi* in which Justices Scalia, Souter, Thomas and Ginsberg joined stated:

> "Moreover, there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the

> right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." See 120 S.Ct. @ 2366

Justice Thomas filed a separate concurring opinion tracing the history of this issue through the common law and the founding of our nation. Justice Thomas wrote in brilliant prose:

> "This case turns on the seemingly simple question of what constitutes a 'crime'." See 120 S.Ct. @ 2368

Further, he noted:

> "This authority establishes that a 'crime' includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment)." See 120 S.Ct. @ 2368

In light of the holding in *Apprendi* and this Court's charge to the jury, the provisions of 21 *U.S.C.* § 841(b)(ii) must be questioned. As noted in our objections to the presentence report, a conviction under § 841, if the amount of cocaine was proven beyond a reasonable doubt and determined by the jury to be five kilograms or more, the petitioner would be sentenced to a "term of imprisonment of not less than ten years or more than life..." However, since the aforesaid proof was not adduced and the charge to the jury was inapposite to the holding in *Apprendi*, 21 *U.S.C.* § 844 applies. Section 844 states in relevant part:

> "Notwithstanding the preceding sentence a person convicted under this subsection for the possession of a mixture or substance which contained cocaine base shall be imprisoned not less than five years and not more than twenty years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds five grams."

It cannot be determined in this case that the crime of which the petitioner stands convicted involves cocaine in an amount exceeding five grams, or any other number. (emphasis added) Accordingly, a second provision under § 844 for simple possession states the following:

> "Any person who violates this subsection may be sentenced to a term of imprisonment of not more than one year and shall be fined a minimum of $1,000 or both..."

The petitioner has been incarcerated for more than three (3) years and accordingly, should be released. Since we are totally uncertain as to what finding was made by the jury on quantity, we must assume that they made no finding at all. Since no crime could be committed without a jury determination of five kilograms or more, the jury's verdict must be disregarded and set aside.

Federal Rules of Evidence Rule 801(d)(2)(E) provides that: "a statement is not hearsay if... (E) a statement by a co-conspirator of a

party during the course and in furtherance of a conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D) or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E)."

In the Advisory Committee notes for the 1972 Proposed Rules, it was noted that:

> (E) The limitation upon the admissibility of statements of co-conspirators to those made "during the course and in furtherance of the conspiracy" is in the accepted pattern. While the broadened view of agency taken in item (iv) might suggest wider admissibility of statements of co-conspirators, the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established. See Levie, Hearsay and Conspiracy, 52 Mich. L.Rev. 1159 (1954); Comment, 25 U.Chi.L.Rev. 530 (1958). The rule is consistent with the position of the Supreme Court in denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved. *Krulewitch v. United States*, 336 U.S. 440, 69 S.Ct. 716, 93

> L.Ed. 790 (1949); *Wong Sun v. United States,* 371 U.S. 471, 490, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). For similarly limited provisions see California Evidence Code Section 1223 and New Jersey Rule (63(9)(b). Cf. Uniform Rule 63(9)(b).

The 1974 Enactment of Rule 801(d)(2)(E) provided in a note to the subdivision by Senate Report No. 93-1277, as follows:

> The House approved the long-accepted rule that a "statement by a coconspirator of a party during the course and in furtherance of the conspiracy" is not hearsay as it was submitted by the Supreme Court. While the rule refers to a coconspirator, it is this committee's understanding that the rule is meant to carry forward the universally accepted doctrine that a joint venturer is considered as a coconspirator for the purposes of this rule even though no conspiracy has been charged. *United States v. Rinaldi*, 393 F.2d 97, 99 (2d Cir.), cert. denied 393 U.S. 913 (1968); *United States v. Spencer*, 415 F.2d 1301, 1304 (7th Cir. 1969). Senate Report No. 93-1277.
>
> Rule 801 supplies some basic definitions for the rules of evidence

> that deal with hearsay. Rule 801(d)(1) defines certain statements as not hearsay. The Senate amendments make two changes in it."

The 1997 amendment to Rule 801(d)(2) provided:

> Rule 801(d)(2) has been amended in order to respond to three issues raised by *Bourjaily v. United States*, 483 U.S. 171 (1987). First, the amendment codifies the holding in *Bourjaily* by stating expressly that a court shall consider the contents of a coconspirator's statement in determining "the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered." According to *Bourjaily*, Rule 104(a) requires these preliminary questions to be established by a preponderance of the evidence.
>
> Second, the amendment resolves an issue on which the Court had reserved decision. It provides that the contents of the declarant's statement do not alone suffice to establish a conspiracy in which the declarant and the defendant participated. The court must consider in addition the circumstances surrounding the

statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement in making its determination as to each preliminary question. This amendment is in accordance with existing practice. Every court of appeals that has resolved this issue requires some evidence in addition to the contents of the statement. *See, e.g., United States v. Beckham*, 968 F.2d 47, 51 (D.C. Cir. 1992); *United States v. Sepulveda*, 15 F.3d 1161, 1181-82 (1st Cir. 1993), *cert. denied*, 114 S.Ct. 2714 (1994); *United States v. Daly*, 842 F.2d 1380, 1386 (2d Cir.), *cert. denied*, 488 U.S. 821 (1988); *United States v. Clark*, 18 F.3d 1337, 1341-42 (6th Cir.), *cert. denied*, 115 S.Ct. 152 (1994); *United States v. Zambrana*, 841 F.2d 1320, 1344-45 (7th Cir. 1988); *United States v. Silverman*, 861 F.2d 571, 577 (9th Cir. 1988); *United States v. Gordon*, 844 F.2d 1397, 1402 (9th Cir. 1988); *United States v. Hernandez*, 829 F.2d 988, 993 (10th Cir. 1987), *cert. denied*, 485 U.S. 1013 (1988); *United States v. Byrom*, 910 F.2d 725, 736 (11th Cir. 1990).

Third, the amendment extends the

> reasoning of *Bourjaily* to statements offered under subdivisions (C) and (D) of Rule 801(d)(2). In *Bourjaily*, the Court rejected treating foundational facts pursuant to the law of agency in favor of an evidentiary approach governed by Rule 104(a). The Advisory Committee believes it appropriate to treat analogously preliminary questions relating to the declarant's authority under subdivision (C), and the agency or employment relationship and scope thereof under subdivision (D).
>
> **GAP Report on Rule 801**. The word "shall" was substituted for the word "may" in line 19. The second sentence of the committee note was changed accordingly.

Since the proof was based entirely on hearsay and the jury made no findings as to quantity, the verdict of guilt should be set aside and dismissed, since a new trial would violate the double jeopardy clause of the United States Constitution. This Court now has the opportunity, in this case, to further explain the meaning of *Apprendi*, *supra* with respect to a charge where jurors were specifically told to disregard quantity and purity. This should also consider the extent to which uncorroborated hearsay alone can or cannot support a finding of guilt. Here the Trial Court arrogated enormous power to itself; superseded the jury's function; and, placed no limits on the permissible hearsay testimony.

POINT II

The Petitioner Was Deprived Of His Constitutional Rights Of Trial By Jury; Due Process Of Law And The Right Of Confrontation In That The Trial Court Improperly Allowed Into Evidence The Plea Agreement And Allocution Of Carlos DeLuna, An Admitted Drug Dealer And Member Of A Drug Conspiracy

The Court allowed into evidence the redacted plea allocution of Carlos DeLuna. The Trial Court determined that DeLuna's statements were admissible because they satisfied a three prong test in that: (1) the witness was unavailable ; (2) the statements are against penal interest; and (3) they are sufficiently trustworthy to warrant their admissibility absent adversarial testing. (Tr. 1194) The Trial Court erroneously concluded that the petitioner was "unavailable" because he would assert the Fifth Amendment, if called to testify. Such reasoning is clearly facetious. DeLuna was debriefed by the Government. The Government entered into a plea agreement with him and allowed him to plead guilty. On what basis would the petitioner be permitted to assert the Fifth Amendment? Presumably as a requisite for the plea he told the truth to the Government, or at least claims to have done so and the Government satisfied itself as to his veracity. In entering into a plea agreement, DeLuna did not expressly agree to cooperate with the United States Government or to testify in a Grand Jury or at trial of any defendants. By agreeing to plead guilty, the petitioner received a benefit for early acceptance of responsibility (see *U.S.S.G.* 3E1.1(a) and (b)(2)), thereby saving himself a life term and reducing his sentence to a Guidelines range of 135-165 months. The plea agreement provided:

> "Nothing in this agreement limits the right of the Government to seek a denial of the adjustment for acceptance of responsibility, see *U.S.S.G.* § 3E1.1, and/or imposition of an adjustment for obstruction of justice, see *U.S.S.G.* § 3C1.1, regardless of any stipulation set forth above, should it be determined that the defendant has either (i) engaged in conduct, unknown to the Government at the time of the signing of this Agreement, that constitutes obstruction of justice or (ii) committed another crime after signing this Agreement." (emphasis added)

It should not be left solely for the Government to decide whether a defendant has complied with a plea agreement. Carlos DeLuna was permitted to escape cross-examination because the Government sought to protect him and block the petitioner's inquiry. Clearly, the only basis that DeLuna would have for asserting the Fifth Amendment is if he had not been truthful with the Government. A defendant entering into a plea agreement clearly wants to be absolved of all of his crimes and to include them into the agreement. For example, the Government agreed "not to prosecute him for conspiracy to distribute and possess with intent to distribute cocaine, [sic] on or about February 10, 1999, and for illegally re-entering and being found in the United States subsequent to his deportation in 1995. . ."

A defendant who enters into a plea agreement must consider the prospect of absolution for any and all crimes which he or she has

heretofore committed against the possibility that if they reveal all of their prior bad acts, they may drive the Government away from the plea bargaining table or increase their sentence. On that basis, some defendants do not tell all. By not allowing for cross-examination the Court and the Government allowed DeLuna to skate on the thin ice of his plea agreement and assertion that he would take the Fifth Amendment. As a condition for any plea agreement with "early acceptance of responsibility" as a negotiated provision, a defendant should be required to promise that he will testify if he was called upon to do so.

By allowing his plea allocution to come into evidence, the Court once again extended the bounds of hearsay testimony to unacceptable limits. They shielded and protected a witness unworthy of such emoluments. They allowed themselves, the Court and the jury to be duped for the sake of expediency. Of course, the petitioner was, in the process, deprived of his right of confrontation. See Amendment 6, United States Constitution. Thus, it is also apparent that DeLuna's statements and plea allocution are inherently unreliable and untrustworthy. He "gave up" only that which the Government required him to in order for it to obtain a conviction against Juan Moises.

It also appears that the Government was "hoodwinked" by Mr. DeLuna. In order to avoid consecutive time, DeLuna raised a legal argument of double jeopardy which the Government claims they genuinely feared. After entering into an agreement with DeLuna, the Government would have this Court believe that it did not anticipate that DeLuna would assert his Fifth Amendment right against self-incrimination. This assertion by the Government is belied by the facts and circumstances. The Government could have provided immunity or forced DeLuna to testify under penalty of contempt.

Once DeLuna had entered into his global plea agreement with the United States Government, he lost his right to assert the Fifth Amendment. Mr. Moises' right of confrontation should have taken preference over DeLuna's purported assertion of a Fifth Amendment privilege. The Government allowed DeLuna the best of two worlds. He was permitted to plead guilty to reduced charges and yet did not have to undergo cross-examination. In every plea agreement with the United States Government, defendants routinely waive their right to Fifth Amendment privileges. Apparently this applies to all but Mr. DeLuna. The defense contends that this is so because the Government, with the assistance of Mr. DeLuna and his counsel, wanted to block the petitioner, Moises, from cross-examining DeLuna. As a result, DeLuna's plea allocution added fuel to the Government's claim that a conspiracy existed and the spillover effect for Moises, without the right to cross-examine or sufficient cautionary instructions, was overwhelming and prevented Moises from having a fair trial.

The Trial Court ruled that DeLuna's allocution was admissible because he was unavailable, that his allocution was against his penal interest and that it possessed sufficient guarantees of trustworthiness. The Court's ruling was tantamount to a charade since DeLuna was available, the allocution was redacted and in the absence of cross-examination there were insufficient guarantees as to its trustworthiness. Since the Government's proof concerned whether there was a conspiracy and whether Mr. Moises was a member of that conspiracy, the limiting instruction which the Court gave that the allocution "bore only upon the issue of whether a conspiracy to distribute narcotics exists and not as evidence of Moises' guilt as a member of the conspiracy."

If DeLuna's plea allocution was full and truthful, then he would have no reason to assert the Fifth Amendment. The full extent of his liability was governed by his negotiated plea bargain. If he was not truthful in his plea allocution, then it might be voided and he might be prosecuted for additional offenses including, but not limited to, drug charges; money laundering; tax evasion and fraud.

Once again the Government contends that any error in admitting the allocution was harmless, ignoring the cumulative effects of multiple errors during this trial. The Government continues to erroneously adhere to it's position since decried by the Trial Court that Mr. Moises did not deny the existence of the charged conspiracy, but rather his participation in it. The Government also frivolously claimed that Mr. Moises had stipulated to quantity by not challenging quantity during the trial. Both contentions by the Government are absurd. It was not for Mr. Moises to challenge the existence of a conspiracy that may not have existed. The Government had to prove the existence of the conspiracy beyond a reasonable doubt. They also had to prove Mr. Moises' participation in the conspiracy beyond a reasonable doubt. In both cases they failed, but for the wrongful receipt of evidence that was circumstantial and in the nature of hearsay.

The Court of Appeals

Unfortunately, the Court of Appeals decision is an insult to this Court and the litigants before it, in that it did not appropriately apply *Apprendi*, *supra* and in fact, deliberately chose to hide their determination by burying it in an unpublished, un-citable "Summary Order."

Conclusion

The judgments below are in error. The testimony of "cooperators" should have been qualified and limited so that the jurors could decide the guilt or innocence of the petitioner on properly adduced evidence. This Petition for a Writ of Certiorari should therefore be granted.

Respectfully submitted,



THOMAS F. LIOTTI, ESQ. (TFL4471)
Admitted to the Supreme Court of the
United States on January 19, 1988
Counsel for Petitioner
600 Old Country Road, Suite 530
Garden City, New York 11530
(516) 794-4700

Appendix

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the Tenth day of May, Two Thousand Two.

PRESENT: HONORABLE JOSEPH M. McLAUGHLIN,
HONORABLE FRED I. PARKER
HONORABLE SONIA SOTOMAYOR
Circuit Judges.

----------X

UNITED STATES OF AMERICA,
Appellee,

v.

CARLOS DELUNA, aka "Primo,"
Defendant,

JUAN MOISES, a/k/a "Johnny Alpha,"
Defendant-Appellant.

United States Court of Appeals - Second Circuit
Filed May 10, 2002
Roseann B. MacKechnie, CLERK

----------X

APPEARING FOR APPELLEE: David M. Rody, Assistant United States Attorney for the Southern District of New York, New York, NY

APPEARING FOR APPELLANT: Thomas F. Liotti, Law Offices of Thomas F. Liotti, Garden City, NY

Appeal from the United States District Court for the Southern District of New York (William H. Pauley III, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the decision of said District Court be and it hereby is AFFIRMED.

Defendant-appellate Juan Moises ("Moises") appeals from a judgment of conviction entered on June 9, 2000, finding him guilty of conspiring to distribute cocaine in violation of 21 U.S.C. § 846, and a sentencing order entered by the district court on June 1, 2001, sentencing him to 240 months of imprisonment, five years of supervised release, and imposing a special assessment of $100.00.

Moises principally challenges his conviction on the grounds that (1) he was improperly convicted on the basis of circumstantial evidence and hearsay, (2) a coconspirator's guilty plea allocution was improperly admitted into evidence, and (3) his trial counsel was ineffective.

First, the alleged hearsay evidence was properly admitted as the statements of coconspirators under Rule 801(d)(2)(E) of the Federal Rules of Evidence. Although the district court did not make express findings as to the

statements' admissibility (and nor did Moises request them), we "must assume on appeal that the trial judge was satisfied of the existence of a conspiracy . . . [, and] the question becomes whether he had reasonable grounds to do so." United States v. Geaney, 417 F.2d 1116, 1119 (2d Cir. 1969). In light of the substantial evidence of Moises's participation in a conspiracy provided by his coconspirators' testimony and corroborated by DEA seizures, passport records, airline records, and phone and pager records, we conclude that the district court had more than ample grounds on which to find the coconspirators' statements admissible.

Second, the guilty plea allocution of coconspirator Carlos DeLuna ("DeLuna") was properly admitted because (1) DeLuna was unavailable to testify as he would have invoked his Fifth Amendment privilege against self-incrimination, (2) DeLuna's guilty plea allocution was against his penal interest, and (3) the allocution possessed sufficient guarantees of trustworthiness. Fed. R. Evid. 804(b)(3).

Third, Moises cannot establish that his trial counsel was ineffective because he did not demonstrate (nor has he even argued) that his counsel's performance fell below an objective standard of reasonableness, and he has not shown that he suffered prejudice as a result. Strickland v. Washington, 466 U.S. 668 (1984); United States v. Vegas, 27 F.3d 773, (2d Cir. 1994).

Moises challenges his sentencing on the ground that the district court violated the holding of Apprendi v. New Jersey, 530 U.S. 466 (2000), by making findings of drug quantity at sentencing. Apprendi, which was decided shortly after United States v. Moises

Moises's conviction, holds that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. Apprendi is not implicated here because the district court's drug quantity findings were not used to enhance Moises's sentence beyond the statutory maximum of twenty years. United States v. White, 240 F.3d 127, 136 (2d Cir. 2001).

Lastly, the district court properly denied Moises's Rule 33 motion, filed approximately seven months after his conviction, because it was untimely. The "time limits [of Rule 33] are jurisdictional. If a motion is not timely filed, the district court lacks the power to consider it." United States v. Dukes, 727 F.2d 34, 38 (2d Cir. 1984).

We have considered Moises's other arguments and find them to be without merit.

For the reasons set forth above, the judgment of the district court is AFFIRMED.

FOR THE COURT
Roseann B. MacKechnie, Clerk

By:_____
Olivia M. George, Deputy Clerk

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the Tenth day of May, Two Thousand Two.

PRESENT: HONORABLE JOSEPH M. McLAUGHLIN,
HONORABLE FRED I. PARKER
HONORABLE SONIA SOTOMAYOR
Circuit Judges.

----------X

UNITED STATES OF AMERICA,
Appellee,

v.

CARLOS DELUNA, aka "Primo,"
Defendant,

JUAN MOISES, a/k/a "Johnny Alpha,"
Defendant-Appellant.

United States Court of Appeals - Second Circuit
Filed May 10, 2002
Roseann B. MacKechnie,
CLERK

----------X

APPEARING FOR APPELLEE: David M. Rody, Assistant
United States Attorney for the
Southern District of New York,
New York, NY

APPEARING FOR APPELLANT: Thomas F. Liotti,
Law Offices of Thomas F. Liotti, Garden City, NY

Appeal from the United States District Court for the Southern District of New York (William H. Pauley III, Judge).

ISSUED AS MANDATE: 5-31-02

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

S1 99 Cr 711 (WHP)

- v -

MEMORANDUM AND ORDER

JUAN MOISES,
a/k/a "Johnny Alpha,"

Defendant.

----------X

WILLIAM H. PAULEY III, United States District Judge:

On June 9, 2000, a jury convicted defendant Juan Moises of one count of conspiracy to distribute and possess with intent to distribute five kilograms and more of cocaine in violation of 21 U.S.C. §§ 812, 841 (a)(1), 841(b)(1)(A) and 846. The jury did not make any finding concerning the quantity of drugs involved in the offense. A few weeks later, the Supreme Court decided Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000).

In preparation for sentencing, the Probation Department prepared a Presentence Investigation Report ("PSR") concluding that Moises had distributed "at least 2,000 pounds of cocaine" (equivalent to 907.2 kilograms).[1] (PSR ¶ 24.) From that finding, the Probation Department reasoned that the base level of the offense under the Sentencing Guidelines was level 38. The Probation Department also recommended a 3 level enhancement for Moises' managerial or supervisory role in the offense.

---

[1] While the Probation Department describes the quantity of cocaine as 2,000 pounds, the testimony at trial referred to kilograms when describing drug quantities.

Subsequently, this Court requested that the parties brief the Apprendi issues spawned by the Probation Department's findings concerning the quantity of cocaine and Moises' leadership role in the offense. In response, Moises argues that he should be sentenced to time served. The Government asserts that the failure to charge the jury with determining the amount of cocaine at issue was harmless error because the jury would have found that the crime involved more than five kilograms of cocaine, and therefore the rule announced in Apprendi is of no practical consequence.

In addition to responding to this Court's inquiries, Moises also moved to set aside the verdict and sought a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure.

BACKGROUND

On December 9, 1999, the Government charged Moises in a one-count superceding indictment with conspiracy to distribute and possess with intent to distribute five kilograms and more of cocaine, from in or about 1990 up to and including in or about September, 1998, in violation of Title 21 U.S.C. §§ 812, 841(a)(1), 841 (b)(1)(A) and 846.

At trial, Edward Vidal ("Vidal") and Rafael Duverge ("Duverge"), co-conspirators and cooperating witnesses, testified that they received or conspired to receive over 2,000 kilograms of cocaine from Moises. Cocaine shipments into the United States were described generally as ranging from 100 to 600 kilograms for each transaction. Eighty-six kilograms was the smallest quantity of cocaine mentioned at trial. (Trial Transcript ["Tr."] 777-78.) The sizable drug quantities were not disputed at trial. Moises' counsel argued that Vidal and Duverge were "big time drug dealers" (Tr.50) but that Moises was not. Testifying in his own defense, Moises acknowledged knowing Vidal and Duverge,

but denied any involvement with illegal drugs and claimed that he was a legitimate security and communications businessman. (E.g., Tr. 1223-27, 1241-42, 1249-51, 1253-56, 1285-88, 1295-96, 1517.)

At the close of evidence, this Court instructed the jury that in order to find the defendant guilty of conspiracy, it was required to find that "an objective of the conspiracy was to distribute or to possess with intent to distribute more than five kilograms of cocaine." (Tr. 1583.) However, consistent with the then widespread practice in the Second Circuit, this Court also instructed the jury that "the purity and actual quantity of the cocaine involved is immaterial." (Tr. 1584.) Additionally, the Court never asked the jury to make a specific finding concerning the quantity of cocaine involved in the offense. Neither counsel objected to those jury instructions or the verdict sheet.

After two days of deliberations, the jury found Moises guilty as charges. Not surprisingly, the jury did not specify the quantity of cocaine that Moises was guilty of conspiring to distribute or possess with the intent to distribute.

DISCUSSION

I. Apprendi

Section 846 of the United States Code, Title 21 makes it unlawful to attempt to conspire to attempt to commit any offense found in the Controlled Substances Ac t, in this case, distribution and possession with the intent to distribute narcotics under 21 U.S.C. § 841. The punishment for violating § 846 is the same as for the underlying crime that was the object of the conspiracy. 21 U.S.C. § 846.

Prior to Apprendi, settled law in the Second Circuit provided that for "crimes charged under 21 U.S.C. § 841 [and § 846], the quantity of the drug involved is not an element of the offense to be determined by the jury beyond a reasonable doubt," rather, "quantity relates solely to sentencing, and as such, is considered a factor to be determined by the sentencing court." United States v. Thomas, 204 F.3d 381, 383 (2d Cir. 2000) (internal quotes and citations omitted), vacated and remanded, __ U.S. __, 121 S. Ct. 749 (2001). Apprendi effectively reversed Thomas, holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" as a matter of constitutional law. Apprendi, 530 U.S. at 490, 120 S. Ct. at 2362-63. Consequently, the Supreme Court remanded Thomas in light of Apprendi. The Second Circuit recently decided to hear Thomas en banc. See United States v. Thomas, No. 98-1051, 2001 WL 33281680 (2d Cir. Apr. 20, 2001).

In the wake of Apprendi, other circuits that have revisited opinions akin to Thomas have held that drug quantity is an element of § 841 and therefore must be determined by a jury beyond a reasonable doubt. See, e.g., United States v. Robinson, __ F.3d __, No. 99-4071, 2001 WL 475935, at *1 (7th Cir. May 3, 2001); United States v. Fields, 242 F.3d 393 (D.C.Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-47 (4th Cir. 2001); United States v. Jones, 235 F.3d 1231, 1236 (10th Cir. 2000); United States v. Page, 232 F.3d 536, 543 (6th Cir. 2000), cert. denied, __U.S.__, 121 S. Ct. 1389 (2001); United States v. Doggett, 230 F.3d 160, 164-65 (5th Cir. 2000); cert. denied, __U.S.__, 121 S. Ct. 1152 (2001); United States v. Rogers, 228 F.3d 1318, 1326-27 (11th Cir. 2000); United States v. Nordby, 225 F.3d 1053, 1059 (9th Cir. 2000); United States v. Aguayo-Delgado, 220 F.3d 926, 933-34 (8th Cir. 2000), cert. denied, __U.S.__, 121 S. Ct. 600 (2000).

While the Second Circuit has not decided the issue, Circuit Judge Sotomayor sitting as a district judge reasoned that "[t]here is no principled way to distinguish this Court's calculation of the drug quantities involved in the drug conspiracy in this case from the trial court's determination of the racial motivation for defendant's firearm possession crime in Apprendi." United States v. Moreno, No. S3 94 Cr. 0165 (SS), 2000 WL 1843232, at *5 (S.D.N.Y. Dec. 14, 2000). This Court agrees. Under Apprendi, drug quantity is an element of the crime that must be found beyond a reasonable doubt and not a sentencing factor to be determined by a preponderance of the evidence. See also, e.g., United States v. Tavarez, No. 96 Cr. 895 (SWK), 2001 WL 303821, at *5 (S.D.N.Y. Mar. 28, 2001) (Government agreed Apprendi applicable to determination of drug quantity for sentencing purposes).

The Government argues that Moises effectively stipulated to the quantity of drugs at issue by failing to challenge the amount and admitting that his co-conspirators are "big time drug dealers." This argument is not persuasive. As an element of the offense, the Government bears the heavy burden of proving the necessary drug quantity. Moreover, at the time of trial, drug quantity was not an element of the offense to be determined by the jury under the law of this circuit. Accordingly, Moises had no reason to challenge the quantity. The Government's effort to transmogrify Moises' pre-Apprendi decision not to contest the quantity of drugs into a stipulation that the drug quantity at issue is 2,000 kilograms is a bridge too far.

Similarly, the Government's harmless error argument is inapplicable since any error would only occur at sentencing.

In the wake of Apprendi, the general verdict returned by the jury in this case only authorizes this Court to sentence Moises to the most lenient statutory maximum, which is twenty years imprisonment under 21 U.S.C. § 841(b)(1)(C). However, when

called upon to determine the proper sentence within the statutory maximum, the Court retains discretion to consider any relevant factors relating to the offense and the offender, including the quantity of drugs involved in the offense, the role the defendant played in the conspiracy, and whether he committed perjury at trial. See Apprendi, 530 U.S. at 481, 120 S. Ct. at 2358 ("We should be clear that nothing . . . suggests that it is impermissible for judges to exercise discretion - taking into consideration various factors relating both to offense and offender - in imposing a judgment within the range prescribed by statute."); Moreno, 2000 WL 1843232, at *6 (quantity of drugs involved is relevant to sentencing).

II. Rule 33 Motion

Rule 33 of the Federal Rules of Criminal Procedure provides that motions for a new trial, other than those based upon newly discovered evidence, "may be made only within 7 days after the verdict or finding of guilty or within such further time as the court may fix during the 7-day period." Fed. R. Crim. P. 33. Rule 33's seven-day limitation is jurisdictional. If a motion is not timely filed, the district court lacks power to consider it. United States v. Dukes, 727 F.2d 34, 38 (2d Cir. 1984); United States v. Pagan, 829 F. Supp. 88, 89-90 (S.D.N.Y. 1993), aff'd mem., 28 F.3d 102 (2d Cir. 1994); see also Fed. R. Crim. P. 45 (b) ("court may not extend the time for taking any action under Rule [ ] . . . 33, . . . except to the extent and under the conditions stated in {Rule 33]").

Moises' motion is not based on newly discovered evidence. In addition, he did not file this motion or request an extension of time in which to file his motion within the seven-day period following the jury verdict. Accordingly, Moises' motion is time-barred.

CONCLUSION

The defendant Juan Moises' motion for a new trial is denied. Sentencing is scheduled for June 1, 2001 at 11:30 a.m.

Dated: May 24, 2001
New York, New York

SO ORDERED:

WILLIAM H. PAULEY, III
U.S.D.J.

Copies mailed to:

Marc L. Mukasey, Esq.
David Rody, Esq.
United States Attorneys Office
for the Southern District of New York
One Saint Andrews Plaza
New York, NY 10007

Thomas F. Liotti, Esq.
1001 Franklin Ave., Suite 300
Garden City, NY 11530